

COPY

FILED

APR 08 2004

FRESNO COUNTY SUPERIOR COURT

By  DEPUTY

1 HILDA CANTÚ MONTOY, CITY ATTORNEY
2 CITY OF FRESNO
3 By: Larry A. Donaldson, Sr. Deputy (065658)
4 2600 Fresno Street
5 Fresno, California 93721-3602
6 Telephone: (559) 621-7500
7 Facsimile: (559) 488-1084
8 Attorneys for Plaintiff, People of the State of California

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF FRESNO, CENTRAL DIVISION

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA,

13 Plaintiff,

14 vs.

15 MARCUS WESSON,

16 Defendant.

Case No. F049017856

PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO HAVE JUDGE WHO
SEALED SEARCH WARRANTS HEAR
MOTION TO UNSEAL WARRANTS;
and POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: April 21, 2004
Time: 1:30 p.m.
Dept: 60

19 NOTICE IS HEREBY GIVEN TO THE FRESNO BEE BY AND THROUGH ITS'
20 ATTORNEY, BRUCE A. OWDOM, THE DEFENDANT MARCUS WESSON BY AND
21 THROUGH HIS ATTORNEY, THE COUNTY OF FRESNO PUBLIC DEFENDER,
22 CHIEF DEFENSE ATTORNEY PETER JONES, AND THE PEOPLE OF THE STATE
23 OF CALIFORNIA BY AND THROUGH THEIR ATTORNEY THE FRESNO COUNTY
24 DISTRICT ATTORNEY, CHIEF DEPUTY LISA GAMOIAN that the City of Fresno Police
25 Department (hereinafter "Police") will move to have any hearing on motions that may be
26 filed by the Fresno Bee or any other person or entity to unseal any previously sealed
27 search warrant, affidavits, return, and addendums in this case heard by the judge that
28 sealed the warrant, affidavits, returns and addendums.

1 The Motion will be heard in Department 60 on April 21, 2004, at 1:30 p.m. or as
2 soon thereafter as the matter can be heard.

3 This motion is based upon this Motion, the accompanying Points and Authorities
4 and any other documents previously filed in this case.

5 I.

6 **STATEMENT OF FACTS**

7 On Tuesday, March 30, 2004, the City of Fresno Police Department (hereinafter
8 "Police") returned search warrants issued in this case to the Fresno County Superior
9 Court as required by law. The Police also petitioned that the warrants, the affidavits,
10 and their returns be filed under seal. Affidavits justifying the request to file them under
11 seal accompanied the petitions. Upon reviewing and considering the affidavits, Fresno
12 County Superior Judges, The Honorable R.L. "Chip" Putnam and The Honorable Bruce
13 Smith, found good cause to file the warrants under seal and the issued their orders
14 sealing the warrants, affidavits, returns and affidavits supporting the petition to seal
15 them were issued. (Copies of the Orders Sealing the warrants, affidavits, returns and
16 affidavits supporting the petition and the findings supporting the sealing are attached to
17 this Motion.)

18 On April 1, 2004, Bruce Owdom, the Attorney representing the Fresno Bee,
19 placed a telephone call to The Honorable Lawrence Jones, the judge scheduled to hear
20 the Preliminary Hearing in this matter, and indicated that the Fresno Bee was
21 requesting that the warrants be unsealed. Judge Jones then requested that the
22 attorneys for the Fresno Police Department, the People of the State of California, the
23 Defendant Marcus Wesson and the Fresno Bee report to his court to determine what
24 was being requested and the proper procedure to be followed. A conference in
25 chambers on the record was held with all attorneys present. Attorney Bruce Owdom
26 indicated that the Fresno Bee would be filing a motion to unseal the subject warrants.
27 That motion has not yet been filed. City Attorney Larry Donaldson indicated that the
28 City of Fresno Police Department believed that any such motion should be heard by the

1 judges that ordered the warrants sealed. Judge Jones ordered that the Fresno Police
2 Department should file its' motion by Wednesday, April 7, 2004, with the hearing on the
3 motion to be heard on April 21.

4 ii.

5 **ARGUMENTS**

6 No cases directly on point addressing the issue of this motion could be found,
7 however, there are cases that support the principle and logic that any Motion to Unseal
8 the Warrants should be heard by the judges that sealed them.

9 The case of *Donald Roosevelt Soil v. Superior Court of Los Angeles County*, 55
10 Cal. App. 4th 872; 64 Cal. Rptr. 2d 319 (1997) involved a Penal Code §1538.5 motion to
11 suppress evidence in a criminal case. The defendant had filed and prevailed on a
12 previous 1538.5 motion. The District Attorney dismissed the case against the
13 defendant and later refilled the case. The Defendant filed a second 1538.5 motion to
14 suppress evidence and requested that the motion be heard by the same judge that
15 heard the first suppression motion. The trial court denied that motion.

16 The Court of Appeal found that the trial courts denial of defendants motion to
17 transfer the second suppression motion was error. The court examined the legislative
18 history of the 1993 amendment to the Section 1538.5 which allowed the District
19 attorney to refile and relitigate the granting of a 1538.5 motion. The court states at page
20 879-880 of the opinion that:

21 "(T)he district attorney told the Legislature the reason the
22 amendment was needed was because trial deputies were
23 overworked and might lose the first suppression motion
24 simply because they did a poor job of presenting the
25 evidence. Given this statement of need it makes sense that
26 the same judge who heard the first motion, and granted it,
27 should hear the second motion. When the same judge
28 hears the evidence which was previously omitted, or the
argument that the previously unprepared prosecutor forget
to make, then the judge will once again make the correct
ruling, which this time will be to deny the suppression
motion."

27 ///

28 ///

1 The court cites Penal Code Section 1538.5 (p) which limits the Peoples ability to
2 file a new complaint or seek an indictment in order to relitigate the motion or relitigate
3 the matter unless the people discover additional evidence relating to the motion. The
4 section requires this third motion to be heard by the judge who granted the motion at
5 the first hearing if the judge is available. The court concludes that:

6 "Nothing contained within the legislative history suggests
7 that the Legislature intended to allow, in connection with the
8 relitigation of a suppression motion, the type of forum
9 shopping urged by the People. In fact, just the opposite is
true. We conclude, therefore that the language in question
must be construed as applying to all relitigations, not just to
suppression motions...."

10 The language that the court was referring to was the language of 1538.5 (p) set out
11 above.

12 In the case at bar, the Fresno Bee has not yet been heard concerning the
13 sealing or unsealing of the records in question. It is assumed that they will either offer
14 new evidence or at least argument which has not been heard by the judges who sealed
15 the records. It would appear that the rational of the court in the *Soil v. Superior Court*,
16 *supra*, fits on all fours with the case at bar. The judges who issued and sealed the
17 warrants are more knowledgeable with the relevant facts related to the sealing of the
18 warrants and could better weigh any new evidence or argument involved in any motion
19 to unseal the records.

20 California Rules of Court Sections 243.1 and 243.2 as to the sealing of records
21 apply to civil as well as criminal records, therefor the rational in civil cases would be
22 equally applicable to criminal cases as the one before this court. The case of *George L.*
23 *Wilson v. Science Applications International Corp., Copley Press, Inc.* Movant and
24 Appellant, 52 Cal.App. 4th 1025; 60 Cal.Rptr. 2d 883 (1997), is a civil case in which the
25 Appellant *Copley Press*, who was not a party to the litigation when an order to seal a
26 settlement agreement was entered, made a motion to unseal the settlement agreement.
27 At page 1031 of that opinion, the court cites *Scientology v. Armstrong*, 232 Cal. App. 3d
28 at page 1069 (1991) where the *Armstrong* court held that:

1 “(T)he power of one judge to vacate an order duly made by
2 another judge is limited....*Except in the manner prescribed*
3 *by statute a superior court may not set aside an order*
 regularly made.” “ (Italics were used in the Armstrong
 case.)

4 The *Wilson* court supra. at page 1032 concludes that:

5 “... a person seeking to vacate a sealing order which is no
6 longer subject to direct review may do so by making a
7 motion under *Code of Civil Procedure section 1008,*
8 *subdivision (a)* and showing some new or different fact,
 circumstance or law justifying vacation of the existing order
 (Citations omitted).... The motion must be heard by the trial
 judge who entered the sealing order....”

9 The principles of these two cases are very much on point with the issue in the
10 case at bar even though the courts in these two cases are not dealing with the issue of
11 a motion to unseal search warrants. The motion to unseal the search warrants, if and
12 when it is filed, should be set for hearing before The Honorable R.L. “Chip” Putnam and
13 The Honorable Bruce Smith, respectively.

14
15 DATED: April 7, 2004

HILDA CANTÚ MONTÓY
CITY ATTORNEY

16
17
18 By: 

LARRY A. DONALDSON
Sr. Deputy City Attorney
Attorney for Plaintiff

19
20 [30257dlv/lad]

FILED

MAR 30 2004

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FRESNO COUNTY SUPERIOR COURT

IN AND FOR THE COUNTY OF FRESNO

By JS DEPUTY

CENTRAL DIVISION

IN RE SEALED SEARCH WARRANT AFFIDAVIT AND RETURN

No.: ORDER SEALING WARRANT, AFFIDAVIT, RETURN AND AFFIDAVIT
REQUEST FOR ORDER SEALING SEARCH WARRANTS DOCUMENTS: [PER CRC
Rule 243.1]

The court having read and considered the affidavit submitted in support of sealing the above-mentioned warrants, affidavits and returns, and upon the representations made therein that the investigation of Marcus Delon Wesson is ongoing, and further based upon the fact that the investigation would be compromised by a public disclosure of the warrant and any items obtained after service of the warrant, the court orders that the warrant, affidavit in support thereof and any return of the warrant to remain under seal pending further order of this court.

The court specifically finds as follows:

- There exists an overriding interest that overcomes the right of public access to the record;
- The overriding interest supports sealing the record;
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- No less restrictive means exist to achieve the over-riding interest.

THIS ORDER IS OPEN TO PUBLIC INSPECTION. THE AFFIDAVIT REQUESTING
A SEALING ORDER SHALL BE SEALED WITH THE WARRANT AND RETURNS
AND SHALL NOT BE UNSEALED PENDING FURTHER ORDER OF COURT

EXHIBIT A

1 IT IS SO ORDERED.

2 Dated the 30th day of March 2004.

3
4 

5 R.L. Putnam

6 Superior Court Judge

7 Superior Court of California, Fresno County

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

W04912038-8

FILED

MAR 30 2004

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FRESNO COUNTY SUPERIOR COURT

IN AND FOR THE COUNTY OF FRESNO

By JS DEPUTY

CENTRAL DIVISION

IN RE SEALED SEARCH WARRANT AFFIDAVIT AND RETURN

No.: ORDER SEALING WARRANT, AFFIDAVIT, RETURN AND AFFIDAVIT
REQUEST FOR ORDER SEALING SEARCH WARRANTS DOCUMENTS: [PER CRC
Rule 243.1]

The court having read and considered the affidavit submitted in support of sealing the above-mentioned warrants, affidavits and returns, and upon the representations made therein that the investigation of Marcus Delon Wesson is ongoing, and further based upon the fact that the investigation would be compromised by a public disclosure of the warrant and any items obtained after service of the warrant, the court orders that the warrant, affidavit in support thereof and any return of the warrant to remain under seal pending further order of this court.


The court specifically finds as follows:

- There exists an overriding interest that overcomes the right of public access to the record;
- The overriding interest supports sealing the record;
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- No less restrictive means exist to achieve the over-riding interest.

THIS ORDER IS OPEN TO PUBLIC INSPECTION. THE AFFIDAVIT REQUESTING
A SEALING ORDER SHALL BE SEALED WITH THE WARRANT AND RETURNS
AND SHALL NOT BE UNSEALED PENDING FURTHER ORDER OF COURT

1 IT IS SO ORDERED.

2 Dated the 30th day of March 2004.

3 

4 _____
5 M. BRUCE SMITH
6 Presiding Delinquency Judge
7 Fresno County Juvenile Court
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE
CCP §§ 1011, 1013, 1013a, 2015.5
FRCP 5(b)

STATE OF CALIFORNIA, COUNTY OF FRESNO

I am employed in the County of Fresno, State of California. I am over the age of 18 and not a party to the within action; my business address is 2600 Fresno Street, Fresno, CA 93721-3602.

On April 7, 2004, I served the document described as **PLAINTIFF'S NOTICE OF MOTION AND MOTION TO HAVE JUDGE WHO SEALED SEARCH WARRANTS HEAR MOTION TO UNSEAL WARRANTS; and POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action ☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list: ☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

Via Fax (559) 435-8776 and U.S. Mail

Bruce A. Owdom, Esq.
Dietrich, Glasrud, Mallek & Aune
5250 North Palm Avenue, Suite 402
Fresno, California 93704

Via Fax (559) 262-4104 and U.S. Mail

Peter Jones, Chief Defense Attorney
Fresno County Public Defender's Office
2220 Tulare Street, Suite 300
Fresno, California 93721

Via Fax (559) 488-1867 and U.S. Mail

Lisa Gamolian, Chief Deputy
Fresno County District Attorney's Office
2220 Tulare Street, Suite 1000
Fresno, California 93721

☒ **BY MAIL** ☐ I deposited such envelope in the mail at Fresno, California. The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Fresno, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

☒ **(BY FAX)** I caused the above-referenced document to be transmitted by fax to the addressee(s) at the fax number(s) shown.

Executed on April 7, 2004, at Fresno, California.

☒ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ **(Federal)** I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

Dana L. Villines

[30257dlv/lad]

MODE = MEMORY TRANSMISSION

START=APR-07 16:35

END=APR-07 16:44

FILE NO.=248

| STN NO. | COMM. | ONE-TOUCH/ ABBR NO. | STATION NAME/TEL NO. | PAGES | DURATION |
|---------|-------|---------------------|----------------------|---------|----------|
| 001 | OK | 8 | 94358776 | 011/011 | 00:04:00 |
| 002 | OK | 8 | 92624104 | 011/011 | 00:02:44 |
| 003 | STOP | 8 | 94881687 | 000/011 | 00:00:00 |

resent - see attached
488-1867

-FRESNO CITY ATTORNEYS OFC-

***** -559 488 1084 - ***** 559 488 1084- *****



OFFICE OF THE CITY ATTORNEY
2600 FRESNO STREET
FRESNO, CALIFORNIA 93721-3602
(559) 621-7500
Facsimile (559) 488-1084

FACSIMILE TRANSMITTAL SHEET

Date: April 7, 2004

Acknowledgment Requested? Yes or No

Time: 4:30pm

Via Regular Mail? Yes or No

Number of Pages Transmitted: 11 including this cover sheet.

TO: BRUCE A. OWDOM, Esq. - Dietrich, Glasrud, Mallek & Aune
5250 North Palm Avenue, Suite 402; Fresno, California 93704
Fax: (559) 435-8776 / Voice (559) 435-5250

TO: PETER JONES, Chief Defense Attorney - Fresno County Public Defender's Office
2220 Tulare Street, Suite 300; Fresno, California 93721
Fax: (559) 262-4104 / Voice (559) 488-3546

TO: LISA GAMOIAN, Chief Deputy - Fresno County District Attorney's Office
2220 Tulare Street, Suite 1000; Fresno, California 93721
Fax: (559) 488-1867 / Voice (559) 488-3141

FROM: Larry A. Donaldson, Police Legal Advisor/
Senior Deputy City Attorney - City Attorney's Office

Contact: Dana L. Villines, Legal Secretary II

RE: *People of the State of California vs Marcus Delon Wesson*
Fresno Superior Court Case No. F049017856

ATTENTION!
THIS COMMUNICATION IS CONFIDENTIAL AND PROTECTED BY PRIVILEGES,
INCLUDING BUT NOT LIMITED TO, ATTORNEY-CLIENT
AND ATTORNEY WORK PRODUCT.

SHOULD THIS COMMUNICATION BE RECEIVED BY SOMEONE OTHER
THAN THE ADDRESSEE, PLEASE RETURN IT IMMEDIATELY
TO THE CITY ATTORNEY.

IF TRANSMISSION IS INCOMPLETE, ILLEGIBLE OR ALL PAGES
HAVE NOT BEEN TRANSMITTED, PLEASE CALL (209) 498-1328
AS SOON AS POSSIBLE

MODE - MEMORY TRANSMISSION

START-APR-07 16:45

END-APR-07 16:53

FILE NO. -249

| STN NO. | COMM. | ONE-TOUCH/ ABBR NO. | STATION NAME/TEL NO. | PAGES | DURATION |
|---------|-------|---------------------|----------------------|---------|----------|
| 001 | OK | 2 | 94881867 | 011/011 | 00:06:24 |

-FRESNO CITY ATTORNEYS OFC-

***** -559 488 1084 - ***** 559 488 1084- *****



OFFICE OF THE CITY ATTORNEY
2600 FRESNO STREET
FRESNO, CALIFORNIA 93721-3602
(559) 621-7500
Facsimile (559) 488-1084

FACSIMILE TRANSMITTAL SHEET

Date: April 7, 2004

Acknowledgment Requested? Yes or No

Time: 4:30pm

Via Regular Mail? Yes or No

Number of Pages Transmitted: 11 Including this cover sheet.

TO: BRUCE A. OWDOM, Esq. - Dietrich, Glasrud, Mallek & Aune
5250 North Palm Avenue, Suite 402; Fresno, California 93704
Fax: (559) 435-8776 / Voice (559) 435-5250

TO: PETER JONES, Chief Defense Attorney - Fresno County Public Defender's Office
2220 Tulare Street, Suite 300; Fresno, California 93721
Fax: (559) 262-4104 / Voice (559) 488-3546

TO: LISA GAMOIAN, Chief Deputy - Fresno County District Attorney's Office
2220 Tulare Street, Suite 1000; Fresno, California 93721
Fax: (559) 488-1867 / Voice (559) 488-3141

FROM: Larry A. Donaldson, Police Legal Advisor/
Senior Deputy City Attorney - City Attorney's Office

Contact: Dana L. Villines, Legal Secretary II

RE: *People of the State of California vs Marcus Delon Wesson*
Fresno Superior Court Case No. F049017856

ATTENTION!

THIS COMMUNICATION IS CONFIDENTIAL AND PROTECTED BY PRIVILEGES,
INCLUDING BUT NOT LIMITED TO, ATTORNEY-CLIENT
AND ATTORNEY WORK PRODUCT.

SHOULD THIS COMMUNICATION BE RECEIVED BY SOMEONE OTHER
THAN THE ADDRESSEE, PLEASE RETURN IT IMMEDIATELY
TO THE CITY ATTORNEY.

IF TRANSMISSION IS INCOMPLETE, ILLEGIBLE OR ALL PAGES
HAVE NOT BEEN TRANSMITTED, PLEASE CALL (209) 498-1326
AS SOON AS POSSIBLE